

FEDERAL MEDIATION AND CONCILIATION SERVICE

ARBITRATION AWARD

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IN THE MATTER OF ARBITRATION)	
)	
Between)	
)	FMCS#11-54147
DeZURICK, INCORPORATED)	Ben Owaleon, Grievant
)	
and)	
)	John Remington,
)	Arbitrator
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS, DISTRICT #165)	
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THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over the termination of Grievant Benjamin Owaleon, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Federal Mediation and Conciliation Service, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on September 30, 2011 in Sartell, MN at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties requested the

opportunity to file post hearing briefs which they did subsequently file on October 31, 2011.

The following appearances were entered:

For the Company:

Bob Lundell	Human Resource Consultant
Cary Simon	Human Resource Director
Cherie Hanson	Human Resource Generalist
Mike Loomis	Plant Manager
Dan Hedtke	Supervisor
Brad Luberts	Supervisor

For the Union:

James Kiser	Directing Business Representative
John Grundhoefer	Union Steward
Tim Heisick	Union Steward
Gary Ulloa	Union Steward

THE ISSUE

DID THE COMPANY HAVE JUST CAUSE TO TERMINATE THE EMPLOYMENT OF GRIEVANT BENJAMIN OLAWÉON AND, IF NOT, WHAT SHALL THE REMEDY BE?

PERTINENT CONTRACT PROVISIONS AND RULES

ARTICLE 2
Conditions of Employment

1. The management of and control of said plant; the direction, supervision and control of all employees therein, the right to transfer and suspend or discharge any employee for just cause, and the right to lay off any employees because of lack of work or other proper cause, shall vest in the employer at all times.

ARTICLE 8
Employee's Seniority

6. Seniority rights of any employee shall be canceled upon the occurrence of any of the following events, to wit:

.....

C. The discharge of the employee by the Employer for just cause.

ARTICLE 11
Suspension and Discharge of Employees

2. No employee who shall have completed the probationary period as outlined under Article 8 in the service of the Employer shall be arbitrarily suspended or discharged from his employment, thereafter by the Employer. In each case where the Employer shall suspend or discharge any employee who shall have completed said probationary period for just cause, the action of the Employer, shall be in form of a written notice given personally or by mail to the employee affected, expressing the action taken and the grounds therefore. Any employee affected by any such action of the Employer, in the nature of suspending or discharge, who shall deem himself aggrieved thereby shall have a right to a hearing thereon before the Employer, the plant superintendent or foreman provided that he shall not later than the third (3rd) regular work day next succeeding such written notice of suspension or discharge, file his written demand for such hearing with and addressed to the Employer, and in the event of the employee's failure to do so within the time aforesaid the action of suspension or discharge taken by the Employer shall be final, conclusive and fully effectual for all purposes.
3. Before discharging an employee, the supervisor will discuss the matter with the employee's Steward.

ARTICLE 12
Procedure for Adjustment of Grievances and
Arbitration

6. ARBITRATION

A. If a grievance is not satisfactorily settled when processed through the Grievance Procedure the grievance may be submitted to arbitration by the Union.

B.

C. The Arbitrator acting under this Article shall not have the power to add to, to disregard or modify any of the provisions of this contract and shall have authority to decide only the issues submitted.

D. The expense and compensation of the arbitrator shall be borne and divided equally between the Union and the Company.

E. Decision of the Arbitrator shall be binding on both parties.

BACKGROUND

DeZurik Water Controls Inc., hereinafter referred to as the “COMPANY” or “EMPLOYER,” is engaged in the manufacture and distribution of valves, controls and related parts at its plant in Sartell, Minnesota. All machine shop employees of the Company, excluding foundry, clerical, supervisory and executive employees are represented by the International Association of Machinists and its District #165, hereinafter referred to as the “UNION.”

Benjamin Olaweon, the Grievant in this matter, was employed by the Company as a Shipping/ Receiving/ Crater in the shipping department. The record reflects that Grievant was initially employed by the Company in its “rubber room” in August of 2007.

He subsequently bid on a position in the Company's Shipping Department and was transferred there in January of 2009. It would appear that Grievant's job performance in the rubber room was less than wholly satisfactory as evidenced by the unrebutted testimony of Company Plant Manager Mike Loomis. However, it must be noted that Loomis was not the Plant Manager when this asserted performance issued occurred and the Company provided neither documentation nor other testimony concerning the matter.

On August 17 of 2009 Grievant was issued a Verbal Warning in the Shipping Department by Supervisor Dan Hedtke. This disciplinary notice, which was reduced to writing (Company Exhibit #1), states, in relevant part:

On the date listed above I observed Ben working on the same pallet/ order for 6 hours. Ben has been talked to before about his performance and this is another example of taking to [sic] long to complete his job in a timely manner and is unacceptable. In a total of eight hours only two orders were completed. Pictures are provided to show the projects that were worked on. Ben's performance must improve or further disciplinary actions will follow.

The above Exhibit reveals that Grievant refused to sign the discipline although receipt was acknowledged by the signature of a Union Steward. While Loomis testified that this disciplinary action was not grieved, his testimony in this regard was contested by that of Union Steward John Grundhoefer, and the Union provided a copy of a grievance dated 8/24/09 signed by both Grievant and Grundhoefer (Union Exhibit #1). The grievance states:

I disagree with the written verbal warning I received on 8/17/09. My job performance is equal to what other craters do on second shift. I feel I have been singled out and unjustly punished. I request that this warning be removed.

There was no response from Hedtke and neither party was able to provide further testimony or documentation regarding the resolution of this grievance. The Union did offer a shipping log comparison prepared by Grundhoefer from Company records that purports to show that Grievant performed approximately the same amount of work as was performed by the two workers combined working next to him on another line.

Grundhoefer also testified, without rebuttal, that second shift workers like Grievant typically are required to do more work to equal the productivity of first shift workers performing the same or similar tasks. This is so, Grundhoefer testified, because 2nd shift Craters have more set up work and less assistance than those working on the first shift.

While Grundhoefer's testimony was credible, the lack of follow up by the Union compels the Arbitrator to find that the grievance was dropped.

Hedtke then issued Grievant a second warning on January 28, 2010 (1st Written Warning (Warning Two)). This notice states:

On 1/22/10 Ben was given a pink packet with items to prepare for shipment. The items listed were pulled and in his line ready to crate at the beginning of the shift. When Ben finishes that pink he is to move on to other pinks. This pink was never finished. The two items that Ben worked on took 8 hrs of time. One being a pallet that took 6hrs and one pre-made box filled with the items checked off, which took two hours. [The Crater is required to build a custom pallet from materials provided by the Company.] Pictures provided. It was observed and investigated by myself and day shift supervisors that Ben's work performance was sub par and should have taken about half the time that was claimed. This is the third time Ben has been talked to about his performance, and this is another example of taking to [sic] much time to complete his job in a timely manner, and is unacceptable.

Ben's performance must improve to avoid further disciplinary actions up to and including termination.

Grievant also refused to sign this notice but it was witnessed by Union Steward Tim Heisick. The Union and Grievant responded by filing a grievance on February 3, 2010 which states:

I disagree with the Company's notice I received on 1/28/10. The Company failed to treat me equal to my co-workers. Therefore, I request the notice/ write up be removed from my record.

Hedtke did not respond to this grievance. However, he issued Grievant another "Employee Notice/ Warning" -2nd Written-Suspension (Warning Three) on February 12, 2010. This Employee Notice/ Warning states:¹

On 2/11/10 Ben was given a pink packet with the items to prepare for shipment. The items were pulled and in the line ready to crate at the beginning of his shift. These items of interest were six 8" BAW valves with actuators. Ben made three skids and stapled down to them three pre made cardboard boxes. This was started at about 4:00 P.M. and was not finished until 9:15 P.M. This is a total of five plus hours to complete. Pictures provided. It was observed and investigated by myself, and the day shift supervisor that Ben's work performance was again below expectations and should have taken less than half the time that was claimed. Ben was also asked why this occurred, and his reasons had to do with safety, working alone and bending lag bolts. I then responded by saying why didn't you contact myself if you are having these problems. Ben had no response. This is the fourth time Ben has been talked to about his performance, and this is again another example of taking to [sic] much time to complete his job in a timely manner, and is unacceptable. Ben has received ample training and should be at par with other employees.

Ben's performance must improve to avoid further disciplinary actions up to and including termination.

¹ Although the Warning/ Notice indicates that Grievant was to be suspended, the write up does not indicate that he was given any time off nor does the record of the hearing reveal that he actually served a disciplinary suspension in connection with this incident.

Grievant again refused to sign the disciplinary notice but it was acknowledged by Union Steward John Grundhoefer.

Grievant responded to this disciplinary notice with the following written grievance:

I disagree with this warning and my 2 previous warnings that I have received. Dan [Hedtke] is using me as an example for so called low productivity. Nowhere in the contract does it state that we must reach a certain level of productivity. I am working constantly unless there is no work available at my work station. I am working equally as hard as my co-workers in shipping dept. I request all of my warning be removed from my file.

Documents submitted by the parties (Joint Exhibit #3) reveal that Hedtke did not respond to this grievance either. However, Company documents dated November 8, 2010 reveal that a grievance meeting on the February 3, 2010 grievance was held on February 12, 2010,² and that the grievance was subsequently resolved on March 8, 2010, as follows:

The Union and Company agreed to allowing [sic] Ben a 90 day grace period from discipline for productivity. It was also agreed that, "All previous discipline remains in his file and is in effect following the expiration of the grace period." Ben returned from voluntary layoff on May 24, 2010.

This March 8, 2010 resolution obviously considered the February 12 Employee Notice/ Warning since it is referenced in the November 8, 2010 disciplinary summary. This summary did not reference either grievance, however.

² No response to this grievance was provided until the February 12 grievance meeting which occurred nine days after the alleged productivity problem which gave rise to the February 3 grievance. It further appears from the record that Grievant was issued the February 12 discipline discussed above after the February 12 grievance meeting had already been held. The wording of the January 28 and February 12 Employee Notice/ Warnings are quite similar. Hedtke provided no testimony to explain wither the timing of the February 12 discipline or its similarity to a previous disciplinary warning.

The above November 8, 2010 document also reveals that Grievant was involved in a separate incident which occurred on October 26, 2010 following his return from the above voluntary layoff. The document indicates that:

October 26, 2010- Ben took the keys out of a forklift and put them in his pocket. A co-worker got on the lift and discovered the keys were missing. He asked Ben where the keys were and Ben took them out and tossed or threw them down the aisle. Ben admitted to this incident and said he was wrong and should be punished.

Following the investigation on October 28, Ben was sent home for the balance of the night (he worked 2 hours) to control the situation. He was asked not to come to work on Friday also because the chief union steward and plant manager were both out of the office.

Although the next step in the discipline process is termination, the Company found there were some mitigating factors that caused Ben to be frustrated. Therefore the Company has decided to give Ben one final chance to retain his employment. Any further infractions of Company rules to include, but not limited to, inappropriate behavior or productivity will result in termination.

Thursday, October 28 remains an unpaid suspension. The Company has agreed to pay Ben eight hours for Friday, October 29.

This document was signed by Grievant and the Union on November 9, 2011.

It would appear from the record that Grievant was discharged on February 3, 2011 following two separate incidents that occurred on January 21, 2011 and February 3, 2011 respectively. The first incident did not result in a formal disciplinary notice and is referenced only in a Company document dated February 3, 2011 entitled simply "Ben Olaweon – Termination (Company Exhibit #5.) The document states:

On January 21, 2011 Ben was told he needed to increase his productivity. It took him eight hours to complete four

hours of work. Ben says he does things during his shift that affect his ability to build crates and ship product. Ben was told to contact Dan Hedtke if anything came up that would require him to leave his work station or if he needed to assist others at his work station. Ben was told to error [sic] on the side of telling Dan if he will be doing anything other than crating.

This document provided by the Company (Company Exhibit #5) only reveals that on January 21, 2011, Grievant was told that he needed to “increase his productivity.” Grievant apparently responded that he does things during his shift that affect his ability to build crates and ship products. Grievant was advised to contact Hedtke if anything came up that would require him to leave his work station or if he needed to assist others. The document does not identify the author of the document, who “told” Grievant that he needed to increase his productivity, or what would constitute an increase in productivity. The document does not even suggest that the interaction between Grievant and a Company representative, presumably Hedtke, was intended as discipline. The Arbitrator can only conclude that the above statement was written after the fact, quite possibly after the February 3 incident occurred. Accordingly, the January 21 incident must, at the very most, be deemed counseling.

The report of the second incident is similarly vague. The document simply states:

On February 3, 2011 Ben was asked about his productivity on Friday, January 28 when it took him five and one-half hours to complete about one hour of crating. He didn't remember the work he did that night or why it took him so long. He was also asked about his work the night before (Wednesday, February 2.) He was asked about helping a co-worker with the printer. He said he did. He said he didn't contact Dan [Hedtke] because it took less than 10 minutes. According to Dan he was there for fifteen minutes. Also that same night Ben went to the shipping desk to assist a coworker. He said he didn't contact Dan. Dan said in the two weeks since he had been talked to Ben

has only told him one time that he would be out of his station. Ben said he tried to contact Dan many times, but could not remember a single example.

Ben was terminated for productivity and failure to follow directions from his supervisor.

The Arbitrator must therefore conclude that Grievant was given verbal notice of his termination on or about February 3 since there is no indication that the above document was given to either Grievant or the Union. Neither is there anything within the record to show that the termination was discussed with Grievant's steward.

Grievant contested his discharge through the filing of an unnumbered written Grievance signed by Grievant and Union Business Representative James Kiser on February 7, 2011. This grievance alleges violation of "Article 8, Section 6 and all applicable clauses" of the collective agreement. In remedy it requests that Grievant be reinstated "with all lost pay and benefits due to me for this unjust termination." This grievance was not answered by Hedtke or any other Company representative. However, a grievance meeting was subsequently held on February 28, 2011. The outcome of this meeting is revealed in a memorandum from Human Resources Director Cary Simon and Plant Manager Mike Loomis to Union Business Manager James Kiser and Steward John Grundhoefer (Company Exhibit #6).³ The document states in relevant part:

.....
With respect to the confidential medical concern brought to the company by Ben Owaleon during the above referenced meeting, the Company has determined that the medical concern was brought to the company after the termination, is undiagnosed, and is untreated at this time. Therefore, the Company believes the medical concern is not applicable to Ben Owaleon's termination.

³ Notation on the memorandum indicates that it was mailed to Kiser on March 3, 2011 and hand delivered to Grundhoefer on the same day.

The Company has reviewed all circumstances involved with Ben Owaleon's employment. He was terminated due to his lack of productivity, his attitude, and his lack of following instructions. Therefore, the Company has determined that the termination of Ben Owaleon stands, and the Company considers this grievance closed.

The grievance was not settled to the satisfaction of the Union and was submitted to arbitration by the Union in accordance with the provisions of the collective agreement. There is no contention that the grievance is procedurally defective or inconsistent with the requirements of the agreement. Accordingly, it is properly before the Arbitrator for final and binding determination.

CONTENTIONS OF THE PARTIES

The Union takes the position that the Company failed to demonstrate that it had just cause to terminate Grievant. Specifically, the Union argues that the Company failed to demonstrate that it had met any of the commonly accepted tests of just cause. In this connection the Union notes that there is no rule or standard regarding productivity for employees in Grievant's job classification and that the Company provided neither clear job expectations, comparisons of the productivity of other similarly situated employees, nor time study results to demonstrate Grievant's alleged low productivity. The Union further argues that the Company provided no evidence to substantiate its claim that Grievant was either unproductive or that he failed to follow the directions of his supervisor. The Union maintains that the Company failed to properly investigate the allegations of low productivity; failed to conduct a fair and objective investigation; and failed to produce evidence of Grievant's alleged shortcomings as a result of their investigations. The Union also contends that the Company was unable to show that it

progressively disciplined Grievant. Finally, the Union asserts that there was no “last chance agreement” between the Union and the Company regarding Grievant.

The Company takes the position that it progressively disciplined Grievant for low productivity beginning in August of 2009 and culminating with his termination in February of 2011. In this connection the Company maintains that Grievant was working on a last chance agreement effective November 8, 2010. The Company argues that certain medical information provided by the Union regarding Grievant at the grievance termination is irrelevant and should not be given any consideration whatsoever. The Company maintains that, while measurement of indirect labor is difficult and not amenable to time study, it has the right to exercise informal determination of output expected by employees, and that Grievant has failed to meet those expectations despite counseling and discipline. The Company further takes the position that Grievant was not harassed because of his sexual preference or by placing special reporting requirements on him. Indeed, it contends that it did discipline another employee who it determined had harassed Grievant. Significantly, and contrary to the testimony of Union witnesses, it maintains that Grievant failed to grieve the first two disciplinary events in his record and that those disciplinary actions must therefore be accepted. The Company concludes that has met the tests of just cause in terminating Grievant and that the grievance should be denied.

DISCUSSION, OPINION AND AWARD

It is the Company that shoulders the burden of proof in a discharge case and it must carry that burden in arbitration by more than a preponderance of the evidence. It is

also true that the Company must rely solely on its stated grounds for termination in proving just cause. This is significant because the Company asserts that Grievant was discharged for “lack of productivity, his attitude and his lack of following instructions.” (Company Exhibit #6) While the Company offered evidence of disciplinary actions related to Grievant’s alleged low productivity, it offered no evidence whatsoever concerning his attitude and only scant reference to his asserted failure to follow instructions. Indeed, the only reference to his failure to follow instructions is in connection with the ten minute reporting requirement apparently imposed by Hedtke following the above noted incident of January 21, 2011. While such a requirement is not necessarily unreasonable, the circumstances under which it was imposed are exceedingly vague as is the evidence of Grievant’s failure to comply. Here the Company’s case is undermined by the failure of Hedtke to testify and clarify exactly what he told Grievant and what Hedtke’s expectations were. The Company’s case with regard to the charge of failure to follow instructions simply cannot be established absent the credible testimony of Hedtke. It follows that the Company’s justification for Grievant’s termination must be supported solely by evidence of low productivity.

A major difficulty with the case presented by the Company is its reliance solely upon the testimony of Plant Manager Loomis together with the documentary evidence presented above. While Loomis was credible, his testimony was largely hearsay, particularly with respect to Grievant’s productivity issues. While Loomis did testify that he was involved in the disciplinary process and worked closely with the line supervisors, it cannot be denied that the person with the most direct knowledge of Grievant’s productivity and job performance from January 2009 through January of 2011 was his

immediate supervisor, Dan Hedtke. The failure of the Company to call Hedtke to testify, despite the fact that he was present throughout the arbitration hearing, places him in the role of a silent accuser. Presumably he had first hand knowledge of Grievant's performance and was in a position to compare Grievant's productivity with that of other employees or support his criticism of Grievant's performance through production records. Instead he remained silent. The Arbitrator is therefore compelled to draw an adverse inference from Hedtke's failure to testify.

As noted by the Company, Grievant's first formal discipline for unsatisfactory productivity was issued on August 17, 2009. Despite the Company's insistence that no grievance was filed, the Arbitrator finds, based on both the grievance document submitted by the Union and the credible testimony of Union Steward John Grundhoefer, that a written grievance protesting this discipline was submitted to the Company. However, as the Arbitrator has hereinabove noted, it appears that the grievance was not pressed by the Union and must be deemed abandoned. This is so even though there is no indication that Hedtke responded to the grievance as required by Article 12 of the parties' agreement. Hedtke was new to his supervisory duties at the time and may not have been aware of this contractual requirement.

Grievant's next written warning concerning productivity was issued by Hedtke on January 28, 2010. Again the Company maintains that no grievance was filed but the documentary evidence and testimony provided by the Union indicates otherwise. Here again the Company's contention fails primarily because of the lack of testimony from Supervisor Hedtke who by this point had served as a supervisor long enough to be familiar with the requirements of the collective agreement. It is also significant that

Hedtke failed to answer the grievance despite the clear contractual requirement that he do so in writing. Article 12.4 unambiguously requires that “the supervisor shall (emphasis added) record his decision on the grievance form within two (2) working days from the date of his receiving same and return the decision to the Steward.” Given Hedtke’s failure to testify, the Arbitrator must draw the adverse inference that he received the grievance and was unable to provide a response or dispute Grievant’s claim of unequal treatment.

Grievant was issued “Warning Three” on February 12, 2010, only nine days after Grievant had protested the January 28 discipline above. This short time span suggests the possibility of retaliation, particularly since the discipline was issued only hours after a grievance meeting to resolve the prior discipline for low productivity. Once again the lack of testimony from Hedtke is significant. There is no dispute that the Company received this grievance but once again there is no supervisor’s answer from Hedtke, a clear violation of Article 12.4. Drawing an adverse inference from Hedtke’s silence suggests that Grievant may indeed have been singled out and supports the Union’s contention that there were no communicated performance or productivity standards given to Grievant.

The incident of October 26, 2010 was the next disciplinary action taken against Grievant. This incident is both tangential to Grievant’s productivity issues and has been given little weight by the Arbitrator because the only evidence, excepting Grievant’s limited testimony on the subject, was the hearsay testimony of Loomis and the November 8, 2010 discipline summary (Company Exhibit #4) presumably written by Simon.⁴ While

⁴ The Arbitrator has attributed this document to Simon since he was the only Company official who signed it. Simon did not testify at the hearing.

the Company characterizes this document as a last chance agreement, it cannot be so construed since Grievant qualified his signature by indicating only that he acknowledged receipt of the document. The Arbitrator must therefore find that there was no agreement between the parties that this was a last chance agreement, even though the Company may have viewed the resolution as such.

It would appear that the November 8 resolution resulted in improved productivity on Grievant's part because there is no record of any problems until the January 2011 incidents which resulted in Grievant's termination. According to Company documents, Grievant was questioned about his productivity again on February 3 in connection with his work on the evening of January 28, 2011. Why Hedtke or other Company representatives waited almost a week to raise this matter with Grievant was unexplained.⁵ Hedtke's failure to testify again compels the Arbitrator to draw an adverse inference. Given the delay in confronting Grievant, it is not surprising that Grievant's memory was uncertain when questioned about his work on January 28. The Arbitrator must also note that Hedtke once again failed to answer the grievance of February 7, 2011 and apparently failed to discuss the discharge with Grievant's Steward before termination, a clear violation of Article 11.3 of the collective agreement.

Reviewing the above summary of Grievant's disciplinary actions for low productivity raises serious questions as to the Company's reluctance to comply with the contractual grievance procedure and hence its motivation. While there is no doubt that there was concern on the part of the Company over the quantity, but not the quality, of Grievant's work, the evidence of low productivity presented is far from conclusive. It is

⁵ When asked by the Union on cross examination why Grievant wasn't talked to on January 28, 2011, Loomis did not respond.

certainly true, as the Company argued, that there is a great diversity of job assignments in the shipping department and Grievant was in an indirect labor position. However, there appear to have been no general productivity standards or requirements. Neither did the Company offer production records or productivity comparisons with other employees engaged in work the same or similar to Grievant's. Further, there is no indication that Hedtke or other Company official ever told Grievant what he needed to do to improve his productivity or set any production goals or expectations that Grievant could attempt to meet. The Company might well have established through Hedtke's testimony what improvements Grievant was expected to make or what constituted satisfactory productivity but did not do so. When reduced to its essence, the Company's position appears to be that they have the management right to determine what satisfactory productivity is and that this "standard" can be arbitrarily determined by line supervisors. Although the Company does have the right to unilaterally establish production standards, the collective opinions of the supervisors are hardly sufficient to do so, particularly if these opinions are not even communicated to the employees. In summary, the evidence of low productivity submitted by the Company is simply inadequate to demonstrate just cause to terminate Grievant's employment.

Brief comment is warranted concerning the implication that Grievant was harassed because of his sexual preference. Although there is evidence within the record that Grievant was harassed by a co-worker in at least once instance, and that the October 26, 2010 suspension was at least attributable in part to this harassment, there is no hard evidence that Grievant's sexual preference was related to his discipline for low productivity. Grievant's sexual preference appears to have little, if any relevance to the

disciplinary actions taken against him for low productivity. However, it is troubling, albeit perhaps coincidental, that Grievant's productivity issues seemed to disappear for nearly a year after February 12, 2010 only to apparently re-appear after the harassment incident. Given the Company's obvious reluctance to provide significant information or testimony regarding this incident, it is impossible to determine from the record how Hedtke or other employees may have responded to Grievant's admitted sexual preference.

The Arbitrator has made a particularly thorough review and analysis of the entire record in this matter together with a detailed inspection of the documentary evidence offered into evidence by the parties. Further he has determined that the critical issues which arose in these proceedings have been addressed above, and that certain other matters raised by the parties at the hearing and in the post hearing briefs must be deemed immaterial, irrelevant or side issues, at the very most, and therefore have not been afforded them any significant mention, if at all, for example: whether or not the Grievant was required to fill out special productivity reports; whether or not Grievant's work in the shipping department was suitable for time study; whether or not the employee that harassed Grievant was disciplined; Grievant's reasons for leaving his work station; Grievant's medical issues; whether or not Grievant's productivity suffered because he assisted other employees; and so forth.

Having considered the above review and analysis, together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of the parties' collective bargaining agreement, the Company has been unable to establish,

even by a preponderance of the evidence, that it had just cause to terminate the employment of Grievant. Accordingly, an award will issue, as flows:

AWARD

THE COMPANY DID NOT HAVE JUST CAUSE TO DISCHARGE GRIEVANT BENJAMIN OWALEON. THE GRIEVANCE CONTESTING HIS TERMINATION MUST THEREFORE BE, AND IS HEREBY, SUSTAINED.

REMEDY

GRIEVANT SHALL BE REINSTATED FORTHWITH WITH ALL BACKPAY, BENEFITS AND SENIORITY TO THE DATE OF HIS DISCHARGE. THE DISCIPLINARY WARNINGS OF 8/17/09; 1/28/10; 2/12/10; AND 2/3/11 SHALL BE EXPUNGED FROM HIS RECORD.

THE ARBITRATOR RETAINS JURISDICTION IN THIS MATTER FOR NINETY (90) DAYS SOLELY IN CONNECTION WITH THE IMPLEMENTATION OF THE REMEDY.

John Remington, Arbitrator

December 27, 2011

Gilbert, Arizona